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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 532

HUDSON-SHARP MACHINE CO.,
A WISCONSIN CORPORATION,
Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
A MASSACHUSETTS CORPORATION,
Plaintiff-Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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I.

REPLY TO PETITIONER'S FIRST POINT.

The Court of Appeals ruling that petitioner had the burden of proof to establish that the machines it had contracted to design and build (but had never built because of claimed inability to design a practical machine), would have been "suitable for sale to others in the ordinary course of its business," is not in conflict with either: (a) any prior decision of the Wisconsin Supreme Court; or (b) any decision of a court of last resort in another state which Wisconsin should follow under the statutory rule of uniformity.

(a) Respondent concedes that the Supreme Court of Wisconsin has adopted the general rule that the burden of proof of compliance with the Statute of Frauds rests upon the party claiming validity of the contract. *Padgham* v. *Wilson Music Company*, 3 Wisconsin 2nd. 363, 88 N.W. 2d. 679. However, the Wisconsin Court has never considered nor passed upon the unique question presented in this case, which is:

> "Should the seller of a machine which it had contracted to design and manufacture but which it had never built because of its alleged inability to design a practical machine, be charged with the burden of proving that the machine, if it had been built, would have been suitable for sale to others in the ordinary course of seller's business."

when the seller pleads the Statute of Frauds as a defense in a suit for damages for its breach of contract.

The Court of Appeals said:

> "We are unaware of any Wisconsin case which has passed upon this question and, therefore, we must look to the underlying policies involved and the law in other jurisdictions in an attempt to determine how Wisconsin courts would decide this issue."

The Court of Appeals is clearly right in its statement that no Wisconsin case has passed upon the question here involved; in fact no Wisconsin case cited by petitioner either here or in the courts below, has even involved application of the exception to the Statute of Frauds relating to specially manufactured goods. And no Wisconsin decision has ever considered the question of burden of proof of facts necessary to bring a case within the terms of the exception. Under these circumstances, there is nothing in the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64 which should prevent the Federal Court from considering "the underlying policies involved and the law in other

jurisdictions in an attempt to determine how Wisconsin Courts would decide this issue."

The alternative advocated by the petitioner, when reduced to its ultimate terms, simply means that the doctrine of *Erie* v. *Tompkins* must be so broadly applied by the Federal Courts that they are rendered powerless to initiate an exception to the general rule of burden of proof in any case, no matter how imperative the demands of reason and justice may be that an exception be made under the special circumstances of a particular case. To put it in another way, if petitioner's argument is sound, the Federal Courts can never develop any exception to a general rule of evidence until after the State Court has itself considered and approved the particular exception,—regardless of how convincing the reasons for making the exception might be.

Respondent submits this would expand the doctrine of *Erie* v. *Tompkins* far beyond its original intent which was to prevent conflicts in matters of substantive law between the holdings of the state and Federal Courts in the respective states. It was never intended to circumscribe the Federal Court's initiative in developing and applying sound principles of jurisprudence in cases which lead up paths which the State Courts have not yet travelled. In some cases the line of demarcation between conflict and consistency may be difficult to define, but in this case, where the Wisconsin Supreme Court has never even had before it a case involving the sufficiency of evidence as to facts necessary to bring a case within the terms of the exception, we submit that the question is not even close.

Since there was no Wisconsin precedent which should be followed, the Court of Appeals was entirely correct in its determination that it became its duty to consider

"underlying policies involved" and also "the law in other jurisdictions" to determine how the Wisconsin Court would decide the issue.

Any consideration of the underlying policies involved will surely result in the same conclusion reached by the Court of Appeals.

Cases involving application of this exception to the Statute of Frauds seem almost invariably to arise in situations where the facts are the *reverse* of those in this case, i.e., a seller-manufacturer is seeking to enforce, not to invalidate a contract for specially manufactured goods against the resistance of an unwilling buyer who invokes the statute as a defense to his obligation to accept and pay for them. In all these cases it was the manufacturer who asserted the validity of the contract; and under the general rule as to burden of proof, it has been held to be encumbent on the manufacturer who, as it happened, was the party claiming a valid contract, to establish affirmatively that the goods were not salable to others in the ordinary course of the manufacturer's business.

Respondent suggests that the underlying reasons for this rule, and the equitable considerations which initially brought about its common law application by the courts and its subsequent incorporation into the statutes were based upon the prevention of injustice to a seller who had specially manufactured goods for a buyer and who was not able because of a special characteristic to resell them to another or to resell them only at a great loss.

> "Why should the Sales Act be so worded as to exclude contracts for the sale of goods that 'are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business?' And why was Section 17 of the original Statute interpreted by most courts so as to exclude such contracts, even

though that Section contained no similar words? Is not the danger of fraud and perjury as great in these cases as in other cases? Possibly not; who can tell! It is very likely, however, that the exclusion of such contracts rests, not upon comparative statistics as to fraud and perjury or upon inchoate notions with respect thereto, but rather upon the fact that the strict application of the Statute in such cases would result in greater injustice to honest dealers than in other sales transactions. The American Courts and the draftsmen of the Sales Act gave weight to this consideration, although the English Courts had not done so. They have modified the law to avoid obvious injustice in hard cases. The English Courts leave the dentist, who made a set of false teeth to fit his patient, and the tailor, who makes a suit to special measure, to make the most they can of misfit teeth and suits, disregarding the fact that their materials and time and skill are now largely wasted. To avoid such loss, the American rule and the Sales Act make the oral contract enforceable, disregarding the supposed danger of fraud and perjury. In cases where the goods are to be manufactured specially for the buyer and are suitable for sale to others, the waste and loss caused by repudiation are not so great; the injustice from non enforcement is not so shocking. * * *" Corbin on Contracts, Vol. 2, Section 477.

In view of this history of the development of the rule and of the reasons for its existence, it seems clear that the underlying reason for the exception in case of special manufacturers ought not to have any application in this case, since exactly the reverse is true here. Hudson-Sharp is not here using the exception as a shield against injustice to one who has actually made a special machine in order to protect itself against a loss caused by lack of a resale market; but on the contrary, is attempting to make use of one of its conditions in order to escape its obligation to even make the machine. The burden of proof rule should

be applied to protect against an injustice—not to perpetrate one.

The other underlying policy factors considered by the Court of Appeals in reaching its determination that the rule of fairness required the assignment of the burden of proof to the petitioner are fully set forth in its opinion (pages 22-25 of the petition) and need not be repeated here.

Respondent therefore submits that a consideration of "the underlying policies involved" clearly justified the Court of Appeals in its determination that the burden of proof should rest upon petitioner under the particular circumstances of this case.

(b) Petitioner also contends that the Court of Appeals erred in failing to import certain New York decisions into Wisconsin law under the uniformity of interpretation provisions of the Wisconsin Statutes applicable to the Uniform Sales Act.

The petitioner broadly claims that the New York Court of Appeals, as well as the intermediate appellate Supreme Court of New York have held in several cases that the burden of proof is on the buyer of specially manufactured goods to establish that the goods are not suitable for sale to others in the ordinary course of the seller's business, in order to bring his case within the exception.

If the New York Court of Appeals had actually considered and decided this question as petitioner contends it did, we would have to agree that a strong argument for similar interpretation by the Wisconsin Courts would then exist because of the desirability of uniform interpretation of the Uniform Sales Act by the several states in which it has been enacted.

The case of *Berman Stores Company, Inc.* v. *Hirsh*, 148 N. E. 212, decided by the New York Court of Appeals in 1925 is the only decision of the highest appellate court of

New York which petitioner cites in support of its contention. It may be worth noting that respondent Erving Paper Mills actually cited and quoted from this same case in the Court of Appeals in support of its contention that the question of burden of proof was an open one. The partly deleted excerpt from the decision of the New York Court which appears on page 12 of the petition herein does not, we believe, fairly present that Court's consideration of the point with which we are concerned. We therefore quote it here, without deletion, as we did in the Court of Appeals:

> "In the present case, though undoubtedly the goods were to be manufactured by the seller especially for the buyer, the evidence does not establish that after manufacture they would not be suitable for sale in the ordinary course of the seller's business. The seller's business is to manufacture and sell goods of similar character. The evidence that the defendants had in their place of business models for the suits ordered, samples and even pieces of the materials from which they were to be made, and that they were described by the defendant's lot numbers, letters and figures, *lead to the inference that in the ordinary course of the defendant's business, such goods were ordered to be manufactured and bought by the defendant's customers. The evidence further establishes that they had a market value.* Under the circumstances *there was no ground for any inference* that the defendant's customers, who in the regular course of defendant's business bought such goods when manufactured upon their order, would not likewise buy them if already manufactured at the time the order was given. *The somewhat unsatisfactory evidence that the defendants agreed to place upon the goods plaintiff's labels and lot numbers is insufficient to show that the goods could not be sold to others.* For these reasons, the plaintiff has failed to show that the alleged contract comes within the exception of the Statute of Frauds." (Emphasis ours.)

This language seems reasonably to mean only that the evidence before the trial court at the close of plaintiff's case established that the goods were suitable for sale to others in the ordinary course of seller's business. It does not say nor necessarily imply that the burden of proof was on the buyer. The question of burden of proof was never considered, determined, nor even mentioned by the court anywhere in its opinion,

The other three New York cases cited by the petitioner are decisions of the New York Supreme Court, an intermediate appellate tribunal. Even if they sustained petitioner's contention, absent affirmance by the highest Appellate Court of the State, they would not be in any sense binding on the Wisconsin Supreme Court under the principle of uniformity. Beyond that, however, we respectfully submit that upon study of the opinions in these cases, it will appear, here too, that the question of burden of proof was not raised, considered, decided, or even mentioned in any of the cases. The most that can be fairly claimed for any of these cases is that the Court concluded that the evidence which was produced did not establish non-suitability for sale to others.

Such determination does not imply that the burden of proof was on either the buyer or the seller. The same determination was entirely permissible and logical, regardless of who had the burden of proof. It is only in the close case that the question of burden of proof becomes important, and in the cases cited by petitioner, the New York Courts obviously felt that the preponderance of the evidence was so great that the same result would be arrived at, regardless of which party had the burden of proof.

Respondent therefore submits that there was no precedent, in Wisconsin or New York, which the Court of Appeals was bound to follow with respect to burden of proof,

and that its determination that the burden should be on the petitioner under the unique circumstances of this case was eminently just.

II.

REPLY TO PETITIONER'S SECOND POINT.

Petitioner's second point is that it has been denied due process because the Court of Appeals, so petitioner claims, unexpectedly placed upon it the burden of proving the "unsalability" (sic) of the machines, rather than their "suitability for sale". It is clear that this contention is really nothing more than a semantic quibble. It is crystal clear from the Court of Appeals' opinion that it considered the terms "salability" and "suitability for sale" to be synonymous, and used them indiscriminately and interchangeably in that sense.

Petitioner implies that had it known that it was to be charged with proving "salability" of the machines, rather than "suitability for sale" it might have called as witnesses at the trial customers who would testify "they would have purchased the Campbell Wrappers as ordered by the defendant-buyer" (sic). (Petition page 14.).

Petitioner of course knew before the trial that suitability for sale to others in the ordinary course of its business would be an issue in the case, because petitioner itself created the issue when it amended its answer, with respondent's consent, to plead the Statute of Frauds as a defense.

It is hard to believe that able and eminent counsel for petitioner failed to call its customers as witnesses to their willingness to buy these unbuilt machines because of any belief that the burden of establishing suitability for sale to others was on the respondent. The advisability and desirability of producing such evidence did not depend on which party had the burden of proof. Obviously, petitioner

could not anticipate all of the evidence bearing on this issue which respondent might produce upon the trial. Whether or not respondent's evidence would be sufficient to sustain the burden, would certainly have to be weighed against the contra evidence produced by petitioner, so there was just as much reason for petitioner to put its best foot forward, so to speak, no matter where the burden lay. Under such circumstances it seems quite inconceivable, if such evidence was available, that petitioner failed to produce it merely because counsel may have thought the burden of proof was on the other side.

III.

OTHER REASONS WHY PETITION SHOULD BE DENIED.

1. It is obvious from the unique character of the factual situation (manufacturer-seller invoking "suitability for sale to others" as *defense* against obligation to build), that this case does not involve a point of major importance or general interest in the administration of justice, and is therefore not of sufficient consequence to command the attention of this court.

2. If the Court of Appeals has erred in its holding as to burden of proof, its judgment of reversal should nevertheless be sustained for the following reasons:

(a) If respondent did have the burden of proof, a fair evaluation of the evidence in the record shows that it sustained that burden. It is apparent from the learned District Judge's opinion that he regarded this as a very close question under the evidence as he reviewed it in his decision (R. 37-40). We suggest that the opinion shows that the learned trial court did not give sufficient consideration and weight to the evidence as to the extent of the changes which would have to be made in these machines before they would be suitable for sale to other paper manufactur-

ers. The order, Exhibit 11, required that these machines package a particular type and size of paper napkins of the precise dimensions of 13¼ inches when quarter-folded. The machine was to be designed to process napkins of the specific thickness, type of embossing and weight produced by Erving. This is shown conclusively by defendant's request in its letter of December 14, 1956 (Exhibit 9) requesting accurate information as to the bulk dimensions and embossing patterns of the napkins as they came from the folding machine. The testimony of defendant's vice president and sales manager, Cletus Wetli, as to the extent of adaptation of the standard or basic Campbell Wrapper which would be necessary to adapt it to plaintiff's paper napkins is also entitled to great weight on this point. Wetli testified (Trans. 286-289) "Q. Did Erving want a standard 2 W10 Wrapper? A. I can answer that, only I have to explain to you what is standard. 2 W6, 2 W8, 2 W10 refer to the size, to the width of the machine and about 75% of the working of that machine is standard. *The other 25%, it varies anywhere from 50% down to 10% would be changed to satisfy the particular product we are going to wrap.*" (Emphasis ours.)

All of the testimony is undisputed and we submit that it brings this case well within the rule of cases such as *Ericsson Manufacturing Co.* v. *Caille Brothers Co.* (Mich.), 162 N. W. 81, where the machinery contracted for, while it was of a general character coming within the seller's line of manufacture, was not in its details of the kind which it regularly made up and usually held for sale in the ordinary course of its business, but instead was specially made for and according to the specifications of the buyer.

Likewise in *Murphy* v. *Munson* (Calif.), 212 Pac. 2d 603 the court recognized that evidence of alterations and changes made in a standard type of machine at the buyer's request rendered it unsalable to others in the ordinary

course of the seller's business within the meaning of the Statute of Frauds.

The order for these machines (Exhibit 11) also required the machines to be equipped with infeed and delivery conveyors so as to integrate them with Erving's folding machines. This equipment would almost certainly have to be changed to integrate the machines with the locational requirements of other purchasers.

The only contrary testimony which the learned trial court referred to (R. 39) is one question and a self serving answer by the witness Olsen, Hudson-Sharp's General Manager, and one statement by Wetli in a memorandum to Olsen. A reference to this specific testimony will show that the witnesses were both referring *in general terms to the salability of a basic type of machine which would wrap paper products in polyethylene*, and not to the *specific machines which Hudson-Sharp was to produce for Erving for use only on Erving's particular type of paper napkin.*

(b) The memorandum was sufficient under the Statute of Frauds.

The Court of Appeals said in its opinion:

> "It necessarily follows that we do not reach the question of whether the writing between the parties constituted a memorandum of the contract sufficient to satisfy the Statute of Frauds."

In his original decision the learned District Judge held the memorandum insufficient *only* because it failed to state one essential term orally agreed upon between the parties, *i.e.*, the type of end seal which the machine was to produce on the finished package.

On Erving's motion for a new trial and other relief, the District Court's attention was called to undisputed testimony which the court had overlooked, establishing exactly the opposite. In deciding this motion, the learned District

Judge, on the basis of this undisputed evidence, vacated his original finding upon which alone he had based his decision that the memorandum was insufficient. However, he made a new and additional finding that: "The words 'efficiently polyethylene wrap' as used in the memorandum are too uncertain." On the basis of this additional finding the District Court denied Erving's motion to vacate the judgment against it.

It is not respondent's intention in this reply to a petition for certiorari to do much more than call this court's attention to the fact that if the memorandum were to be held by this court on appeal to be sufficient, the result reached by the Court of Appeals then would necessarily remain unchanged. Although the scope of Supreme Court Rule 24 seems broad enough, we have some doubts as to the relevancy of this point on a petition for certiorari, or the extent to which this court will care to go into the merits of this point, since the court may at this time very well wish to limit its consideration to the precise grounds upon which the Court of Appeals' decision rests in determining whether the petition should be granted. We therefore limit and conclude our reference to the sufficiency of the memorandum with a quotation, which, if the court does wish to consider the evidence in the record bearing upon this point at this time, may well prove helpful.

> "PURPOSE OF THE STATUTE OF FRAUDS. * * * What is that purpose? It is the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made. It is not to prevent performance or the enforcement of all contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators. Therefore, we should always be satisfied with 'some note or memorandum' that is adequate, when considered with the admitted facts, the surrounding circumstances, and all the explanatory and corroborative and rebutting evidence, to convince the

court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the Statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail." Corbin on Contracts, Vol. 2, Section 498.

Respectfully submitted,

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